(22)

No. 90-1029

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICE, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, dba G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICE, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, INC.; dba MICRO IMAGE; MIDWEST MICROFILM EQUIPMENT & SERVICES, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, TEXAS, UTAH, VERMONT, WASHINGTON AND WEST VIRGINIA, IN SUPPORT OF RESPONDENTS

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The States of Ohio, Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Texas, Utah, Vermont, Washington, and West Virginia (hereinafter the "Amici States") submit this brief in support of Respondents' positions that: (1) the definition of market power should not be construed to require monopoly power in an

unlawful tying arrangement, and; (2) the decision of this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), should not be extended to evaluate claims involving direct evidence of agreement or claims involving unilateral conduct, particularly where there is a limited discovery record on market power issues.

INTERESTS OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted narrowing of the definition of market power applied to unlawful tying arrangements, and undue expansion of the use of summary judgment in antitrust litigation. First, the Attorneys General are the chief law enforcement officers of their states and are charged with the duty of enforcing the antitrust laws. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[1] The Attorneys General also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief.[2] Moreover, they are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law. The States thus play a major role in antitrust enforcement and have a substantial interest in ensuring that the federal antitrust laws are interpreted in accordance with sound antitrust policy and with this Court's prior decisions.

[1] 15 U.S.C. §15c. *See Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (common law *parens patriae*).

[2] *See Georgia v. Evans*, 316 U.S. 159 (1942).

Second, vertical restraints raise issues of great concern to the Attorneys General. Amici States have uncovered instances of antitrust violations by equipment manufacturers accomplished through vertical restraints. Their Attorneys General have brought antitrust actions against such organizations,[3] and are currently investigating various categories of restraints in a number of industries. The positions urged by the Solicitor General and Kodak could effectively immunize anticompetitive conduct by manufacturers and allow practices harmful to consumers to continue unchecked.

Finally, the Attorneys General represent municipalities, counties, state agencies and other government entities that purchase goods and services that are or could be affected by vertical restraints. A decision elevating the showing required to sustain a *per se* tying violation could create insurmountable barriers to successful prosecution of tying claims and impede the States' efforts to preserve competition and to meet budgetary pressures. Similarly, any expansion of the use of summary judgment to defeat claims would likely raise the price and lessen the quality of such service for consumers, and could jeopardize the pro-competitive benefits of multi-sourcing that the States have increasingly sought to employ in purchasing products and services.

The Amici States, both individually and in cooperation with one another, have taken an active role in the enforcement of the antitrust laws. They are committed to

[3] *See, e.g., In re Panasonic Consumer Elecs. Antitrust Litig.*, 1989-1 Trade Cas. (CCH) ¶ 68,613 (S.D.N.Y. 1989).

ensuring that their citizens enjoy the benefits of free competition. The issues involved in this case are of major importance to the preservation of such competition. For the reasons stated herein, the Amici States strongly urge this Court to affirm the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

Amici States address two issues briefed by the Solicitor General and Kodak which the States believe misconstrue existing law. First, the Solicitor General seeks to blur the distinction between the market power needed to establish *per se* tying claims under §1 of the Sherman Act and the monopoly power needed to establish a violation under §2. Contrary to the Solicitor General's assertions, market power for tying purposes is not "akin to monopoly power" either in kind or "in degree." S.G. Br. at 22, n. 21. Rather, as this Court made clear in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), the market power aspect of a *per se* tying claim can be supported by a showing that the seller of the tying product enjoys a large market share, a patent, or some unique characteristic that makes "anticompetitive forcing . . . likely." *Id.* at 16. Opinions in both this Court and the lower courts have consistently recognized that market power for tying claims differs in kind as well as degree from the monopoly power with which §2 is concerned. *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-03 (1969); *Dimmitt Agri Indus., Inc. v. CPC Int'l., Inc.*, 679 F.2d 516, 528-29 and n.11 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). The Solicitor General has offered no justification for abandoning this distinction, and moreover, this case –

in which summary judgment was rendered prior to any substantive discovery regarding market power – offers a poor vehicle for adopting a new standard.

Second, the Solicitor General and Kodak err in contending that summary judgment was proper under the standards enunciated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In that case, summary judgment was granted only after "several years of detailed discovery," because plaintiffs were able to produce only indirect, circumstantial evidence of the alleged predatory pricing conspiracy. *Id.* at 578. It was in the conspiracy context that the Court concluded that if a plaintiff's conspiracy claim is "implausible," plaintiff must then "come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Id.* at 587.

The facts of this case, involving both unilateral conduct and an explicit agreement, offer no justification for extending *Matsushita* beyond the conspiracy context. Not only did the Court of Appeals find an explicit tying agreement, summary judgment was granted here after very limited discovery. *Matsushita*'s standards are inapplicable to claims in which there is direct evidence of agreement or to Sherman Act §2 claims involving unilateral conduct. *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 906 F.2d 432, (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991). Respondents, and other antitrust plaintiffs like them, should be afforded an opportunity to develop their theories through

appropriate discovery before a motion for summary judgment is entertained.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S STANDARD FOR DETERMINING THE REQUISITE AMOUNT OF ECONOMIC POWER NEEDED TO ESTABLISH A TIE-IN PER SE UNLAWFUL UNDER SECTION 1 OF THE SHERMAN ACT.

This Court has properly delineated the elements which may support a showing of economic power sufficient to establish *per se* liability under Section 1 of the Sherman Act in tying cases. In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (*"Jefferson Parish"*), this Court held that the market power aspect of a *per se* tying claim can be supported by a showing that the seller of the tying product enjoys a large market share, a patent, or some unique characteristic that makes "anticompetitive-forcing . . . likely." Both this Court and the lower courts have recognized that this market power differs in kind as well as degree from the monopoly power with which §2 is concerned. *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-03 (1969) (*"Fortner I"*); *Dimmitt Agri Indus., Inc. v. CPC Int'l., Inc.*, 679 F.2d 51, 528-29 and n. 11 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

In *Fortner I*, this Court unequivocally stated:

> The standard of "sufficient economic power" does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market.

394 U.S. at 503.

The *Fortner I* language provides a definition of market power which demonstrates that Kodak and the Solicitor General overstate their case when they argue that market power or economic power is tantamount to monopoly power. Many years later, this Court correctly pointed out that "it is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *per se*." *Jefferson Parish*, 466 U.S. at 9. This well-settled reasoning applies squarely to this case. Now is not the time to reform well-settled law, particularly in light of the scant record below. Furthermore, this Court's decision in *Jefferson Parish* is supported by congressional policies underlying the antitrust laws. *Jefferson Parish*, 466 U.S. at 10.

Turning to *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977) (*"Fortner II"*), this Court explained that economic power exists when a seller has power within the market for the tying product to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. Economic power for tying purposes in *Fortner II* is an *appreciable* level of economic power, not

monopoly power as is needed for a Section 2 case. The Court in *Fortner II* further inquired as to whether the seller has some advantage not shared by its competitors in the market for the tying product. Clearly, the Court focused on economic power used as leverage, not monopoly power to control a defined market. *Id.* at 620.

The power to control or force a competitive advantage in a given market for a tied product may also be inferred from the uniqueness of the tying product. *Fortner I, Fortner II* and *Jefferson Parish* all discuss the necessity to ask whether the tying product enjoys some market advantage as a result of its uniqueness or whether the government has granted the seller a patent or similar monopoly over a product. *E.g., Jefferson Parish,* 466 U.S. at 16-17; *Fortner II,* 429 U.S. at 617. It is undisputed that Kodak replacement parts are necessary for Kodak high volume microprocessors and micrographic machines. In this sense they are unique. By tying the availability of Kodak replacement parts to equipment service, Kodak thus may subject itself to the invocation of traditional *per se* analysis. It is the existence of uniqueness or a patent or a monopoly over a product which triggers the *per se* analysis which applies in this case.

Quite apart from the flaws in their overall theory of market power, Kodak and the Solicitor General also err in suggesting that the Ninth Circuit's decision departs from existing precedent. For example, this Court in *Jefferson Parish* stated quite clearly what an antitrust plaintiff, asserting a tying claim, must prove in order to show the kind of anticompetitive forcing that makes *per se* condemnation appropriate:

> *[P]er se* prohibition is appropriate if anticompetitive forcing is likely. For example, if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power . . .
>
> The same strict rule is appropriate in other situations in which the existence of market power is probable. When the seller's share of the market is higher . . . *or when the seller offers a unique product that competitors are not able to offer* . . . the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate.

466 U.S. at 16-17 (citation omitted; emphasis added). The Ninth Circuit decision falls squarely within the guidelines delineated in *Jefferson Parish.*

Additionally, as the Court of Appeals below observed, the District Court denied Respondents the opportunity to engage in discovery on important facts of Kodak's market power, including the extent to which Kodak parts were patented. Under these circumstances, the Court of Appeals properly concluded that, on the record before it, Respondents had made a sufficient showing of market power to survive summary judgment. Nothing in the Court of Appeals' decision warrants the acceptance by this Court of the invitation, extended by Kodak and the Solicitor General, to depart from the market power requirements for tying cases that this Court has consistently espoused.

The Solicitor General submits that the essence of Respondents' claims is that Kodak has attempted to use its monopoly over parts to restrain competition in the

market for service of equipment by tying service to parts. However, the Solicitor General views the "key fact" in this case as Kodak's alleged lack of market power in the equipment markets. Because Kodak "lacks power in equipment markets", the Solicitor General asserts, "it is implausible that it could exercise market power in an aftermarket for replacement parts . . . " S.G. Br. at 12-13. While conceding that economists have constructed models in which firms have an incentive to exploit their locked-in customers, the Solicitor General assumes, on the limited state of the record before the Court of Appeals, that it is economically implausible for Kodak to have any market power in the equipment markets, presumably on the basis that a twenty-three per cent market share[4] is insufficient for any market power and because, as a theoretical matter, any attempt to price parts or service supra-competitively lacks long-term effects upon competition.

Economic analyses over several decades have identified conditions under which tying and related practices do not yield above-normal profits and, moreover, have

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[4] The actual extent of industry concentration and of Kodak's market shares in various equipment markets is factually disputed by the parties. Respondents, for example, point to evidence which they assert shows that Kodak has a 28 per cent share of the high volume copier market prior to Kodak's acquisition of IBM's copier business, a 42 per cent share of the market for capture products, and a 51 per cent share of an asserted separate micrographic market for computer assisted retrieval systems. JA 159, 177. Respondents should be able to develop such evidence, which would further undermine the Solicitor General and Kodak's assumption that Kodak lacks market power in equipment markets.

suggested efficiency explanations for tying. The same literature, however, also indicates that tying may have adverse effects, two of which may be present here. First, one motivation for tying when the seller has market power is price discrimination. According to some economists, the practice is benign because the goal is not to exclude rivals. But Posner argues otherwise. Price discrimination, "by increasing the expected gains from monopoly, . . . increases the social costs of monopoly". R. Posner, *Antitrust Law: An Economic Perspective* at 177 (1976). Second, more recent literature on strategic interactions among firms has developed new insights into the potentially exclusionary effects of tying. This literature has shifted attention away from the question of how tying works, given the demand characteristics, to the critical issue of how tying affects the structure (number and type of sellers) of the industry. Whinston, for example, has demonstrated that tying may exclude otherwise efficient rivals in the tied good market by denying them access to a sufficiently large customer base. Tying by several firms, none of whom may be dominant, can produce a similar result. Whinston, *Tying, Foreclosure, and Exclusion*, 80 Am. Econ. Rev. 837 (Sept. 1990).

In this light, Kodak and the Solicitor General's theoretical assumption that a firm with a twenty-three percent market share cannot have market power, and thus there is no need for further inquiry, is suspect. The approach preempts an inquiry into the likely consequences of adoption of similar practices by rival firms on the ability of independent firms to compete in the tied good market. Moreover, Amici States would suggest that the conclusion that a firm with twenty-three percent market share has no

market power is incorrect without further inquiry. We note that the relationship between market share and market power is complicated. As Landes and Posner have argued, market share may be a misleading indicator of market power, which they define as the ability of a firm or group of firms to raise price without losing a large share of its customers so as to make the price increase unprofitable. Indeed they demonstrate that market share is but one of three major determinants of market power, while the other two concern: (1) the ability of rival firms to increase their output within a reasonably short period of time; and (2) the ability of consumers to find substitutes over a reasonably short period of time. Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 at 996 (1981). In this instance, the products in question are differentiated, some customers may have substantial investments in specific brands, and customers may have incurred such costs when switching to rival brands. Further discovery into the factual circumstances is therefore appropriate.

II. MATSUSHITA'S SUMMARY JUDGMENT STANDARDS ARE INAPPLICABLE TO THE CLAIMS PRESENTED IN THIS CASE

Both Kodak and the Solicitor General submit that the courts below should have applied the standard set forth in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("*Matsushita*"), which allows summary judgment, according to the Solicitor General, "if the factual context renders the claim implausible – if the claim is one that makes no economic sense." S.G. Br. at 10. This reading expands *Matsushita* far beyond its intended scope.

First, there are substantial differences in the procedural posture of the claims before this Court and those presented for summary judgment disposition in *Matsushita*. Summary judgment was granted in *Matsushita* after "several years of detailed discovery . . . " 475 U.S. at 587. In this case, summary judgment was granted by the District Court after only limited discovery.[5] Not surprisingly, the Court of Appeals opined that inasmuch as market power issues were not fully developed through discovery, it could not uphold the District Court's grant of summary judgment based upon Kodak's theory that competition in interbrand equipment markets might discipline its power in the parts market. 903 F.2d at 616. Amici States submit that an expansion of *Matsushita*'s standards to evaluate competing economic theories as to the plausibility of the exercise of market power unnecessarily elevates theory over facts. While the Solicitor General posits economic theory, Respondents have not been afforded the opportunity to adequately develop facts.

Second, it is inappropriate for a court to apply *Matsushita* to cases in which there is direct evidence of agreement or allegations of unilateral conduct. As the issues are framed by Petitioner and the Court of Appeals, this case involves two claims: a tying claim cognizable under §1 of the Sherman Act, and monopolization violative of §2 of the Sherman Act. The second claim is based on

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[5] Respondents had only been permitted to propound one set of interrogatories, serve one request for production of documents on Kodak, and take a total of six depositions. Pet. App. 36-B.

unilateral action by Kodak. And while Kodak suggests that it acted unilaterally in tying parts to service, the Court of Appeals found that Kodak entered into written tying agreements with its equipment owners, which precludes characterization of Kodak's conduct as independent. 603 F.2d at 619.

Matsushita's summary judgment standards must be evaluated in the context in which they were established, that is, in the context of the range of permissible inferences that may be drawn from ambiguous circumstantial evidence of conspiracy. As noted by the Ninth Circuit in *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991) (*"Petroleum Products"*), the "key to the proper interpretation of *Matsushita* lies in the Court's emphasis on the dangers of permitting inferences from certain types of ambiguous evidence." A mistaken inference of conspiracy in a claim involving an alleged predatory pricing scheme may be especially costly, because it may "chill the very conduct the antitrust laws are designed to protect" – cutting prices in order to increase business. *Matsushita*, 475 U.S. at 594. These concerns arise in the context of whether to permit inferences of conspiratorial action from circumstantial evidence. Where, as here, there is direct evidence of a tying agreement, there can be no danger of drawing a mistaken inference which could deter legitimate conduct.

The language of this Court in *Matsushita* supports Amici States' proposition that the economic plausibility of competing inferences of conspiratorial or independent action plays no role in the proper evaluation of whether a party, for summary judgment purposes, has presented

triable issues on Sherman Act Section 1 tying claims. Citing to the absence of direct evidence of a conspiracy to drive plaintiffs out of business by predatory pricing, this Court stated that to survive summary judgment, the plaintiffs must present evidence that tends to exclude the possibility that the conspirators acted independently, *i.e.*, plaintiffs must show that the inference of conspiracy is reasonable in light of competing inferences of independent action or collusive action that could not have harmed the plaintiffs. *Matsushita*, 475 U.S. at 588. If defendants had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. Courts have correctly observed the distinction between direct and circumstantial evidence essential to this Court's reasoning in *Matsushita*:

> We emphasized that the cases of both the Supreme Court and this Court have honored the difference between weighing direct evidence and refusing to draw unreasonable inferences from circumstantial evidence. We summarized our cases as indicating that *Matsushita* applies where the non-movant relies[s] on inferences from circumstantial evidence . . . [T]he *Matsushita* inquiry was appropriate only where there is no direct evidence of a conspiracy . . .

Petroleum Products, 906 F.2d at 441 (citations omitted). *See also, Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania*, 815 F.2d 270 (3rd Cir. 1987); *Arnold Pontiac GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3rd Cir. 1987).

Leading commentators support this reading of *Matsushita*. *Matsushita* "suggests that in the *absence* of direct evidence of an agreement or conspiracy, the plaintiff seeking to avoid summary judgment must show that the conspiracy is economically rational or likely." P. Areeda & H. Hovenkamp, *Antitrust Law* §316.1, at 299 (Supp. 1990). Thus, summary judgment can be resisted either by presenting direct evidence of conspiracy or by showing both that the alleged scheme is economically rational and sufficient circumstantial evidence that a conspiracy was more likely than not. *Id.*

The dangers inherent in the expansion of *Matsushita* beyond the context of circumstantial evidence of conspiracy are not theoretical. In *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, *amended*, 893 F.2d 293 (11th Cir. 1990), a provider of a bar review course agreed not to compete outside of Georgia in return for its rival's agreement to abandon its operation in that state. Despite the existence of this explicit horizontal agreement allocating geographic territories, the Eleventh Circuit, citing *Matsushita*, determined that "conduct as consistent with permissible competition as well as illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 1422. The Circuit Court in *Palmer* reasoned that because one of the agreeing parties intended not to operate outside of Georgia anyway, a contractual promise not to do so was not an antitrust conspiracy. This Court summarily reversed the Eleventh Circuit's conclusions in *Palmer*. 111 S. Ct. 401 (1990). As both the dissent in the Eleventh Circuit's decision in *Palmer* and commentators have pointed out, neither *Matsushita* nor *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) apply where

direct evidence of concerted action is present.[6] *Palmer*, 874 F.2d at 1431 (Clark, J., dissenting); P. Areeda and H. Hovenkamp, *Antitrust Law* §316.1, at 301 (Supp. 1990) ("*Matsushita*'s language has little to do with the appraisal of any explicit agreement"). Amici States respectfully request that this Court decline to adopt the Solicitor General's suggestion that *Matsushita*'s standards for evaluating ambiguous evidence of an agreement be expanded to evaluate the 'plausibility' of economic power in tying or monopolization cases.

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[6] Some commentators have suggested that to the extent that application of the *Matsushita* implausibility standard transforms static or unrepresentative impressions about the state of economic thinking into inflexible rules of law, case law may lag significantly in reflecting the most advanced understanding of the competitive effects of various types of conduct. DeSanti & Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 Antitrust L. J. 609, 652-53 (1990). Amici States agree with the foregoing commentators to the extent they conclude, despite the potential dangers of judicial rigidity from an incorrect interpretation of *Matsushita*, that this Court did not intend to foreclose consideration of "rival economic theories operating within an efficiency framework. The focus upon economic rationality provides at least an indirect invitation for plaintiffs to invoke an expanding economic literature that identifies welfare-reducing possibilities from certain types of pricing behavior. Recent industrial organization literature concerning game theory and strategic behavior provides a rich collection of possible means by which plaintiffs can establish the economic rationality of challenged pricing conduct." *Id.* at 651-52.

CONCLUSION

Even the limited record that Respondents were permitted to develop in this case provides sufficient information upon which to conclude that summary judgment was improper. This is particularly true in light of the existence of an express tying agreement, which obviates the need to prove a conspiracy. Furthermore, the Ninth Circuit remained consistent with existing case law in reversing and remanding this case. Proof of a *per se* tying arrangement may be inferred where the manufacturer of the tying product enjoys economic power. Such economic power should not be construed as tantamount to monopoly power. For the reasons stated herein, the Amici States strongly urge this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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